IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16928 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HAMID ALAYA BALOCH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 16928 of 2003

Ms. Shaheen Qureshi for Mr MM TIRMIZI for Petitioner No. 1

Ms. Mita Panchal, AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 05/04/2004

ORAL JUDGEMENT

The petitioner has filed this petition under under Article 226 of the Constitution of India for appropriate writ, order or direction for quashing and

setting aside an order dated 21.10.2003 passed by respondent No.2 under section 3(2) of the Gujarat Prevention of Anti-social Activities At, 1985 (for short, 'the PASA Act') directing detention of the present petitioner on the grounds stated in the detention order.

2. It was alleged against the petitioner that six offences under the Bombay Prohibition Act, 1949 were registered against him before Mandvi police station in Kachchh district being CR No. 67/02, 46/03, 57/03, 67/03, 74/03 and 104/03 on 24.8.02, 13.5.03, 24.5.03, 18.6.03, 25.6.03 and 13.8.2003 respectively. That the said cases related to offences punishable under sections 66 and 65 (E) read with section 81 of the Bombay Prohibition Act, 1949. It was also alleged against the petitioner that four witnesses had given statements against the petitioner whose names were not disclosed to the petitioner.

3. On the strength of the above registered and unregistered cases, a detention order came to be passed on 21.10.2003, Annexure 'D' at page 18 to the petition. The petitioner has challenged the order of detention on several grounds. It has been contended that the petitioner cannot be treated to be bootlegger and there was inordinate delay in passing the order of detention. That the representation of the petitioner was not dealt with and decided in time. That therefore, the order of detention is illegal and requires to be quashed and set aside.

4. On receiving the petition, rule was issued and in response to the notice of rule, Ms. Mita Panchal, learned AGP appears on behalf of the respondents.

During the hearing of the petition, the petitioner has argued that the detaining authority has considered statements of four witnesses whose names have not been disclosed to the petitioner.

5. It is true that under section 9(2) of the Act, power of privilege can be claimed and was claimed by the detaining authority. However, it is well settled that before claiming privilege under section 9(2), the detaining authority has to verify the genuineness and correctness of the statements of such witnesses whose names have not been disclosed to the detenu, in order to ascertain if there is genuine apprehension or fear in the minds of the witnesses. There appears to be no credible material on record to show that the detaining authority

was satisfied that there was such credible materials for withholding the names of the witnesses.

6. In this respect, we may refer to an order of this Court (Coram: Hon'ble Mr Justice A L Dave) in Special Civil Application No.294/2000 passed on 19.4.2000 wherein it has been clearly laid down that before claiming privilege under section 9(2) of the Act, the detaining authority must have credible material before it in order to ascertain the reasonable fear or apprehension in the mind of the witnesses whose names have not been disclosed to the detenu. It has also been observed that if there is no credible material before the detaining authority, even non-disclosure of the names of the witnesses would violate principles of natural justice and consequently, the order of detention cannot be sustained in the eye of law.

7. In the present case also such materials are not apparent on record and consequently, the detention order will naturally fall on the aforesaid grounds.

8. Learned Advocate for the petitioner has also contended that there are six offences registered against the petitioner involving offences punishable under section 65 and 66 of the Bombay Prohibition Act, 1949. The last offence registered is of 13.8.2003 and the order passed is of 21.10.2003. She therefore, argues that there is a delay of more than two months in passing the order of detention. Learned AGP has argued that there were statements of four witnesses came to be recorded on 8.9.2003 and on 10.9.2003 which were verified by the Dy.Superintendent of Police on 24.9.2003 which were further verified by the detaining authority on 13.10.2003. That there was no delay in passing the order of detention considering the dates on which the statements were recorded and verified by the two authorities. Once the above statements are omitted from consideration, then it can be said that there was delay of more than two months in passing the order of detention which would show that there was no immediate need for the detaining authority to exercise jurisdiction in passing the order of detention. In the premises, the order of detention was not required to be passed and consequently, the order of detention would fall on the ground of delay.

9. It has also been contended that the aforesaid offences would not lead to a threat to public order. Learned AGP has argued that the above position would raise a threat to public health and therefore the order of detention is justified.

10. On this aspect of the case, learned AGP has relied upon a decision of the Hon'ble Supreme Court in the case of Kanuji S Zala v. State of Gujarat, 2000 (4) GLR 3256, wherein it has been observed about the threat to public order and public health.

11. This decision was required to be considered along with a case of Amanullakhan Kudstallakhan Pathan v.State of Gujarat, 2000(4)GLR 3623. However, the said decisions were required to be considered by this court in LPA No. 223 of 2000 in Special C.A. no.554/2000. Paras 8.1. and 8.2. are relevant for the purpose of considering the present petition also. They are reproduced for ready reference as follows:

"8.1. The learned Judges had an occasion to deal with a decision in the case of Kishore Naginbhai Parmar v. State of Gujarat in para 2 of the judgment. The Division Bench also referred to three other decisions: Piyush Kantilal Mehta v. Commissioner of Police, AIR 1989 SC 491, Om prakash v.Commissioner of Police: JT 1989 (4) SC 177 and Rashidmiya alias Chhava Ahmedmiya Shaikh v. Police Commissioner, Ahmedabad and anr.: AIR 1985 SC 1703. On a careful consideration of the above judgments, this Court found that the fact that certain prohibition cases were registered against the petitioner cannot lead the court to a finding that the petitioner was a bootlegger or was a dangerous person.

8.2. Even the issue of public health was considered by the Division Bench in the aforesaid matter. There it was observed that the litmus test is to find out as to whether it is a case of a breach of public order or a breach of public health and therefore, in order to arrive at the said finding there must be credible material to support the said order.

8.3. It has also been observed that whatever stated by three witnesses with regard to the unregistered offences and with regard to the three incidents referred to in the judgment, ita cannot be considered to be the material germane for the purpose of consideration of a threat to public health and public order and therefore, the only material which remains is the registered criminal cases and that itself cannot be said to be a material for the purpose of holding that the

appellant's activities had become a threat to public order and public health."

On considering the above decisions, this Court has held that the activities of the petitioner did not amount to a threat to public health or public order. Looking to the above observations, they would be directly applicable to the case on hand. It is clear that the activities could not be treated to be fatal to the public order or public health.

12. Learned advocate for the petitioner has also contended that the representation of the petitioner was required to be dealt with promptly. That the father of the petitioner had made a representation to the detaining authority as well as to the State Government wherein it was clearly said that the facts alleged in the statements of unnamed witnesses were verified by him and had found that those facts were not correct and the incidents stated were never took place. It is the argument of the petitioner that the respondents have not filed affidavit in order to explain how that representation was dealt with. It is true that the representation was rejected by the State Government. However, it has not come on record through affidavit to show that the contents of the said apprehension of the father of the petitioner were verified and were found true. In absence of any credible material on record, it cannot be said that the contents of the representation of the father of the detenu were examined and verified and thereafter representation was turned down. In the case of Harijan Govind Jadav v. State of Gujarat * Ors. reported in 1987 (1) GLR 216, it has been laid down that making of a representation and its consideration by the appropriate authority are not mere empty formalities. The pertinent observation made in para 5 and they are reproduced for ready reference as follows:

"Making of a representation and its consideration by the appropriate Government are not mere empty formalities. It being a matter of liberty of a citizen and it being a matter of an obligation under Article 22(5) of the Constitution, ita becomes the duty of the appropriate Government to apply its mind to the representation before rejecting the same. Mere rejection of a representation is not really did not exist in the sence indicated above, it was the duty of the State Government to enquire into that aspect and find out if there was any substance to the said allegation. No attempt in that behalf was made

by the State Government and that clearly shows lack of awareness of its constitutional obligation. That powers conferred under detention laws are coupled with duties also appears to have been forgotten. The State Government is required to be reminded that discharging those duties is equally necessary as exercising the power conferred upon it."

13. In the present case also in absence of any credible material on record, it cannot be said that the representation was objectively considered by the appropriate authority. In absence of any material on record when the representation is not found to have been considered objectively, the object of making mandatory provision under Article 22 (5) of the Constitution of India has been frustrated as the valuable right of the petitioner has been defeated by not properly considering the representation of the detenu. At least it is not on record that the representation was objectively considered.

14. In above view of the matter, the detention of the detenu could not be sustained in the eye of law and therefore, the detention order is required to be quashed and set aside by allowing the present petition.

15. For the foregoing reasons, this petition is allowed. The impugned order dated 21.10.2003 passed by respondent No.2 is ordered to be quashed and set aside. The detenu is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute to the aforesaid extent. No order as to costs. D.S. permitted.

[D P Buch, J.]

msp